GREAT EASTERN LIFE ASSURANCE CO. LTD.

v.

DIRECTOR-GENERAL OF INLAND REVENUE

PRIVY COUNCIL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD MACKAY OF CLASHFERN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
[APPEAL NO. 24 OF 1985]
29 JULY 1986

REVENUE LAW: *Income Tax - Income of appellant insurance company registered in Singapore - Derived from investments in Malaysia for Singapore Life Fund or held simply as assets of general business of life insurance - Whether subject to income tax by Inland Revenue in Malaysia - Ambit and effect of ss. 3, 4, 52, 60 of Income Tax Act 1967 - Whether prima facie applicability of ss. 3, 4 ousted by specific provisions of s. 60.*

This is an appeal from the decision of the Federal Court which unanimously dismissed the appeal from the High Court. The High Court had upheld the decision of the Special Commissioners of Income Tax who unanimously confirmed the Inland Revenue's assessments to tax the income of the appellant, an insurance company registered in Singapore, from investments representing their Singapore life fund and from non-assigned Malaysian funds.

The question raised by this appeal to the Privy Council turns entirely upon the ambit and effect of ss. 3 and 4 and 52 and 60 of the Income tax Act 1967 (as amended). Section 3 is the principal charging section of the Act while s. 4 sets out the classes of income so charged under s. 3.

There are, however, a number of special cases, among them insurance companies, where other specific provisions for the mode of assessment are made out in Chapter 8 of the Act, commencing with s. 52. Insurance companies are dealt with in s. 60.

In computing the income of a non-resident insurance company, s. 60(4)(a) makes it clear that the only income from investments in Malaysia to be brought into account is the income of those investments made out of the insurer's Malaysia life fund. This is inconsistent with ss. 3 and 4 but the appellant contends that inconsistency is catered for by s. 52 which has the effect of substituting the provisions of chapter 8 as the exclusive taxing code for persons carrying on life insurance business in Malaysia.

The Special Commissioners had held that there is no inconsistency between s. 60 and ss. 3 and 4 as s. 60 was concerned merely with the method of computation of the income chargeable to tax under the latter. Investments made by the appellant from their Singapore life fund and from non-assigned Malaysian funds are simply investments producing income which occurs in or is derived from Malaysia and is chargeable under ss. 3 and 4.

The High Court and the Federal Court, although upholding the assessments, accepted that there was *prima facie*, an inconsistency between s. 60(4) and ss. 3 and 4. They were, however, of the opinion that the matter was resolved by s. 60(8) which provides that "any incidental gross income" of an insurance company not brought into computation by sub-sections (3)

to (7) of s. 60 shall be treated as falling under s. 4(f) to be taxed as "gains or profits" not falling under s. 4(a) to (e). The expression "incidental gross income" in s. 60(8) was construed to mean merely income arising as an ordinary incident of the business.

The appellant, however, argues that "incidental gross income" refers to income of a particular subordinate or casual character, such as, for instance, commission on fire insurance policies taken out by the appellant on property mortgaged to it.

Held:

[1] The provisions of Chapter 8 and of s. 60 in particular provide a code for the computation of adjusted income for tax purpose for the special cases to which they relate. They cannot be treated as ousting the provisions of ss. 3 and 4 except in relation to the particular types of income to which they specifically relate.

[2] The appellant's income from Malaysian investments allocated to their Singapore life fund or representing non-assigned funds is either a gain arising in Malaysia from the general business which the appellant carries on and so chargeable under s. 4(a) or dividends or interest accruing in Malaysia and so chargeable under s. 4(c).

[3] The express exclusion of premium income from "incidental gross income" seem to indicate that the expression was considered apt to carry such income, pointing strongly to the High Court and Federal Court's view that "incidental gross income" means merely income arising as an ordinary incident of the business. This coincides with their Lordships' view that the purpose of sub-section (8) was to make it clear that the foregoing provisions of s. 60 were intended to preserve the charge to tax of income not specifically mentioned but otherwise chargeable under ss. 3 and 4 and allocate it to a convenient head to cover all residual income of whatever kind.

[Appeal dismissed with costs]

Case referred to:

Liverpool and London and Globe Insurance Company v. Bennett [1913] AC 610

Legislation referred to:

Income Tax Act 1967, ss. 3, 4, 4(a), (c), 4(f), (d), 5, 21, 52, 60(2), (3), (4), (4)(a), (5), (6), (7), (8)

JUDGMENT

Lord Oliver of Aylmerton:

The appellant is an insurance company registered in Singapore. It has a permanent establishment in Malaysia through which it carries on life assurance business. Under the provisions of the Malaysian Insurance Act 1963 it is required to, and does, maintain a separate Malaysian life fund for the security of that business. Singapore too has similar legislation under which the appellant is required to, and does, maintain a Singapore life fund, constituted in part by investments in Malaysia. It also owns other investments and property in Malaysia as part of its general life insurance business.

The question raised by this appeal - and it is conveniently dealt with in relation to the year ended 31 December 1973 as a typical case, although the same question arises also in relation to assessments from the years ended 31 December 1967-1972 inclusive - is that of the chargeability to Malaysian income tax of the income delivered by the appellant from those investments situate in Malaysia which have either been earmarked for the Singapore life fund or have not been specifically earmarked for any purpose but are simply held as assets of the general business of life insurance carried on by the appellant outside Malaysia.

In the year in question the appellant received interest and dividends of something over RM7,000,000 from Malaysian funds constituting the Malaysian life fund and something over RM1.4 million from investments abroad forming part of the same fund. No question arises with regard to the taxability of that income. Section 60(4) of the Income Tax Act 1967 provides a code for the computation of income of a non-resident insurer carrying on life business in Malaysia from which it is entirely clear - and it is not disputed - that income from investments constituting the Malaysian life fund, whether in Malaysia or elsewhere, is to be brought into account. In addition, however, to income from investments representing the Malaysian life fund the appellant also received some RM690,000 from Malaysian investments representing the Singapore life fund and some RM130,000 from other non-assigned Malaysian funds. These sums and similar income arising in previous years have been assessed to tax by the Director-General of Inland Revenue. The appellant appealed to the Special Commissioners who, on 17 February 1981, unanimously confirmed the assessments but, at the appellant's request, stated a case for the opinion of the High Court which, on 15 November 1983, upheld the substance of the decision of the Special Commissioners, although on rather different grounds from those adopted by them. The appellant appealed to the Federal Court (Lee Hun Hoe CJ, Mohd. Azmi FJ and Hashim Yeop Sani FJ) which unanimously dismissed the appeal. It is from that decision that the appellant now appeals to their Lordships' Board.

The relevant facts were never in dispute and they have already been sufficiently set out save for one additional finding by the Special Commissioners, based on an admission by the appellant, that so far as Malaysia was concerned the Malaysian investment, both of the Singapore life fund and the non-assigned funds, had lost their identity as insurance investments and had become ordinary business investments in Malaysia. The question raised by the appeal is a short one and turns entirely upon the ambit and effect of ss. 3 and 4 and ss. 52 and 60 of the Income Tax Act 1967 (as amended).

The principal charging section of the Act is s. 3 which is in the following terms:

> 3. Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.

The classes of income so charged are set out in s. 4 which provides:

> 4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of-
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> (a) gains or profits from a business, for whatever period of time carried on;
> (b) gains or profits from an employment;
> (c) dividends, interest or discounts;
> (d) rents, royalties or premiums;
> (e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
> (f) gains or profits not falling under any of the foregoing paragraphs.

Section 5, to the terms of which it is unnecessary to refer, lays down the general manner in which chargeable income is to be ascertained. There are, however, a number of special cases, among which are persons carrying on insurance business in Malaysia, in which other specific provision is made for the mode of assessment. These are contained in Chapter 8 which commences with s. 52 reading as follows:

52. In a case where any provision of this Chapter applies, the foregoing Chapters shall also apply but shall be modified in their application to the extent necessary to conform with that provision; and, if in that case there is any inconsistency between that provision and any provision of the foregoing Chapters, that provision of those Chapters shall be void to the extent of the inconsistency.

Insurance companies are dealt with in s. 60, the relevant provisions of which are as follows:

60. (1) This section shall apply for ascertaining the adjusted income for the basis period for a year of assessment from the insurance business of an insurer.

The expression "the basis period" is defined by s. 21 and for relevant purposes may be taken simply to be the insurer's accounting year.

60. (2) Where an insurer carries on life business in conjunction with general business, the life business and the general business shall be treated as separate insurance businesses for the purpose of this section.

Sub-section (3) deals with the computation of the adjusted income from life assurance business of a resident insurer. Sub-section(4) requires to be recited in full. It provides:-

(4) The adjusted income for the basis period for a year of assessment from the life business of an insurer not resident for the basis year for that year of assessment shall where that business is wholly or partly carried on in Malaysia consist of an amount arrived at by -

(a) taking the aggregate of -

(i) the amount of the gross income for that period from the investments made (in Malaysia or elsewhere) out of the insurer's Malaysian life fund; and

(ii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which sub-paragraph (i) applies and which are first receivable in that period in connection with the realisation of those investment or any rights arising from them; and

(b) deducting from that aggregate, where paragraph (a)(ii) is applicable for that period to gross proceeds receivable in connection with any investments or rights, the cost of acquiring and realising those investments or rights, and in any case-

(i) management expenses incurred and commissions paid in that period in connection with insurer's Malaysian life fund or in connection with that part of his life business which is carried on in Malaysia; and

(ii) an amount bearing the same proportion to the head office expenses of the insurer incurred during that period in connection with his life business as the total of the gross premiums received by him during that period on account of Malaysian life policies in force at the end of that period bears to the total of the gross premiums received by him during that period on account of all life policies in force at the end of that period.

Sub-section (5) regulates the computation of income from the general business of a resident insurer and sub-section (6) that of the income of the like business of a non-resident insurer when that business is carried on in whole or in part in Malaysia. Sub-section (7) provides for a limitation on deductions permitted in the case of re-insurance through non-resident insurers. It has no relevance in the context of the question raised by this appeal.

The critical sub-section, since it forms the primary foundation of the appellant's argument, is sub-section(8) which reads as follows:

(8) Where an insurer in connection with his life business or his general business receives any incidental gross income (not being a premium on a policy issued in the course of carrying on that life or general business) for which sub-sections (3) to (7) do not provide, that income shall be treated as income of the insurer falling under s. 4(f) and he shall be deemed to have a separate source in respect of it.

The appellant accepts - and indeed it is beyond dispute - that the income from Malaysian investments forms just as much part of the earnings of the business carried on in Malaysia as does its premium income from that business (see, e.g. the speech of Lord Shaw of Dunfermline in *Liverpool and London and Globe Insurance Company v. Bennett* [1913] AC 610 at pp. 616 and 617). It is, therefore, income accruing in or derived from Malaysia and chargeable to tax under ss. 3 and 4 of the Act, whether as gains or profits of the business under s. 4(a) or as dividends or interest under s. 4(c). The appellant argues, however, that the *prima facie* applicability of ss. 3 and 4 is ousted by the specific provisions of s. 60 which, so it is said, provide a complete and separate code for the taxation of investment income of life insurance companies. In computing the income of a non-resident insurance company carrying on business in Malaysia, it is said, s. 60(4)(a) makes it clear that the only income from investments in Malaysia to be brought into account is the income of those investments which are made out of the insurer's Malaysia life fund. That is, of course quite inconsistent with ss. 3 and 4 of the Act but, it is argued, that inconsistency is catered for by the provisions of s. 52 already quoted, which have the effect of substituting the provisions of Chapter 8 as the exclusive taking code for (*inter alia*) persons carrying on life insurance business in Malaysia. That argument, if correct, has, as was pointed out in the course of the hearing before their Lordships, result which border on the absurd and can hardly have been intended by the legislature. A foreign life insurance company carrying on business abroad but deriving income from investments in Malaysia is undoubtedly, as the appellant accepts, taxable on income from its Malaysian investments under ss. 3 and 4. By opening up a small life office in Malaysia and establishing, as it would be required to do by law, a small Malaysian life fund to secure that business, it can, as the appellant accepts and asserts, confine its taxability to the investments forming part of that fund and avoid altogether any further payment of the tax on investment income arising in Malaysia otherwise than from that fund which would otherwise be taxable. If, of course, that is the effect of the statutory provisions, so be it; but a construction which yields so curious a result is one which requires to be examined with some care.

The Special Commissioners dealt with the argument very simply. Section 60, in their view, was not concerned with chargeability to tax but merely with the computation of the adjusted income upon which tax is to be charged. It is not therefore to be treated as an exclusive code governing the conditions upon which tax is to be charged. So far as the law of Malaysia is concerned, the fact that certain investments may have been earmarked for the Singapore life fund is irrelevant. Those investments are simply, as are the non-assigned funds, investments producing income which accrues in or is derived from Malaysia and that income is chargeable under ss. 3 and 4 of the Act. There is no inconsistency between s. 60 and ss. 3 and 4, the former being merely concerned with the method of computation of the income chargeable to tax under the latter.

Both the High Court and the Federal Court, although upholding the assessments, adopted a rather different approach. They accepted that there was, *prima facie*, an inconsistency between the provisions of s. 60(4) and ss. 3 and 4 which required the latter to be modified to accommodate the provisions of the former; but they found an answer to this in the provisions of sub-section(8) of s. 60 which have already been referred to. Thus the argument

in both Courts centred upon the ambit and effect of that sub-section and, in particular, upon the meaning of the word "incidental" there used, for without that word there could be no doubt whatever that any income not brought into computation in some way by sub-sections (3) to (7) would be taxable under s. 4(f). The appellant argues that the expression "incidental gross income" refers to income of a particular subordinate or casual character, such as, for instance, commission on fire insurance policies taken out by the appellant on property mortgaged to it. The respondent, on the other hand, argues that in so far as it is necessary to invoke sub-section (8) at all "incidental gross income" means no more than income which is an ordinary incident of the carrying on of business and is clearly apt to embrace income from investments for which no specific computation provisions are to be found in the preceding sub-sections.

The point is a short one not susceptible of a great deal of elaboration. Their Lordships prefer the approach of the Specific Commissioners. Just as in the case of an individual, Chapter 4 of the Act provides a code for the computation of the adjusted income for tax purposes, so the provision of Chapter 8 and of s. 60 in particular provide a similar code for the special cases to which they relate. They cannot, in their Lordships' judgement, be treated as ousting or supplanting the provisions of ss. 3 and 4 from which the chargeability to tax arises except in relation to the particular types of income to which they specifically relate (i.e. in this case income from life business carried on in Malaysia). The appellant's income from Malaysian investments allocated to the Singapore life fund or representing non-assigned funds is either a gain arising in Malaysia from the general business which the appellant carries on and so chargeable under s. 4(a) or dividends or interest accruing in Malaysia and so chargeable under s. 4(c).

If and so far as it is necessary to rely upon the provisions of sub-section (8) of s. 60, it has to be accepted that the intention of the legislature in using the expression "incidental gross income" is not altogether easy to discern. As has been pointed out by the appellant, the allocation of such income to s. 4(f) might be thought to indicate that the legislature had in mind income other than investment income which would ordinarily fall either under s. 4(a) or under s. 4(c). On the other hand, the express exclusion of premium income (which would, apart from the provisions of s. 60, have to be brought into the computation and would fall under s. 4(d)) from "incidental gross income" would seem to indicate that that expression was, apart from the exclusion, considered apt to carry such income, a factor which points strongly to the conclusion reached by the High Court and the Federal Court that "incidental gross income" means merely income arising as an ordinary incident of the business. This coincides with their Lordships' view that the purpose of sub-section (8) was, *ex abundanti cautela* to make it clear that the foregoing provisions of s. 60 were not intended to exonerate from computation for the purpose of the charge to tax income not specifically mentioned but otherwise taxable under ss. 3 and 4 but to preserve the charge and allocate it to what might be considered a convenient heard to cover all residual income of whatever kind.

In the result their Lordships are left in no doubt with regard to the correctness of the assessments raised and will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The respondent is entitled to the costs of the appeal to this Board.

Also found at [1987] 2 CLJ 4